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No. 79-932

In the Supreme Court of the United States

OCTOBER TERM, 1979

LARRY L. WARINNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice,
Washington, D.C. 20530

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Petitioner seeks review of his conviction for furnishing false and fraudulent withholding information to his employer on the primary grounds that the statutory requirement to file a withholding exemption certificate violates the Fourth and Fifth Amendments.

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of willfully supplying false withholding information to his employer, in violation of 26 U.S.C. 7205. The trial court sentenced him to one year in prison and fined $500. The court of appeals affirmed (Pet. App. 1-15).

The pertinent facts may be summarized as follows: Petitioner is an airline pilot who earned more than $30,000 in wages in both 1975 and 1976, and incurred tax liabilities of at least $4,000 for 1975 and at least

$4,900 for 1976 (Tr. 90-91, 247-251, 256-257).[1] Section 3402(f)(2) of the Internal Revenue Code (26 U.S.C.) requires that an employee furnish his employer with a signed withholding exemption certificate. Under Section 3402(n), the employer shall not deduct and withhold any tax if the employee certifies that he incurred no income tax liability for the preceding year and anticipates that he will incur no liability for the current year.

On April 1, 1976, petitioner supplied his employer, North Central Airlines, with a "withholding exemption certificate" (Form W-4E) on which he falsely stated that "I incurred no liability for federal income tax for 1975 and that I anticipate that I will incur no liability for Federal income tax for 1976" (Tr. 95-97, 99-101). Petitioner also attached documents to the form setting forth various grounds of protest against the income tax (Pet. App. 2). After petitioner furnished the W-4E, an Internal Revenue Service agent advised petitioner by mail of the conditions for use of Form W-4E and of the penalties for filing a false or fraudulent form (Pet. App. 3). The Internal Revenue Service also notified petitioner's employer that petitioner's use of the form might violate Treasury Regulations, Section 31.3402(f)(2)-1(e) (26 C.F.R.) because of the unauthorized additions. Petitioner's employer thereupon notified him that the Form W-4E that he filed was invalid and that unless a Form W-4E or W-4 without attachments was furnished, the employer would withhold taxes from his salary at the rate of a single person claiming no exemptions, in accordance with the Regulations (Pet. App. 3-4). Petitioner then submitted a new Form W-4E without any attachments, again falsely certifying that he incurred no tax liability for 1975. This Form W-4E provided the basis for petitioner's conviction for willfully supplying his employer with false withholding information (Pet. App. 3-4).

[1]"Tr." refers to the trial transcript.

1. Petitioner does not deny the fact that the Form W-4E that he furnished to his employer falsely stated that he had incurred no tax liability for 1975. He argues (Pet. 3-11, 31-43) that the government violated his Fourth Amendment rights in obtaining the form. It is well settled, however, that the requirement to file tax forms is not a search or seizure within the Fourth Amendment. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 174-177 (1911). See also *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 59-67 (1974).

Petitioner's argument (Pet. 45) that the statutory requirement to file a Form W-4E violated his Fifth Amendment right against compulsory self-incrimination is similarly without merit. The crime of which petitioner was convicted was the filing of a false form, and there was no suggestion that any question on that return would, if answered truthfully, have tended to incriminate him. Compare *United States* v. *Sullivan*, 274 U.S. 259 (1927). Even assuming, however, that petitioner had a legitimate concern about self-incrimination, the Fifth Amendment would not have shielded him from prosecution for the deliberate act of filing a false statement.[2]

2. Petitioner further claims (Pet. 67-76) that he was denied an evidentiary hearing on the question whether he was the victim of an impermissible selective

[2]Petitioner also contends (Pet. 50-51) that he was denied a right to counsel when he furnished the form to his employer. But as the court of appeals correctly pointed out (Pet. App. 9-10), petitioner was not in custody at the time. See *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976). Indeed, he was clearly not coerced into furnishing a form that falsely certified that he had no income tax liability for 1975 and anticipated no such liability for 1976. Moreover, although the Internal Revenue Service had previously warned petitioner of the possible consequences of filing a false Form W-4E (Pet. App. 3), he thereafter made a deliberate choice to file such a form.

prosecution. In petitioner's view, he was selected for prosecution because he was engaged in a tax protest. But as the court of appeals properly observed (Pet. App. 11), petitioner failed to establish a prima facie case that the prosecutor's decision to prosecute him was impermissibly based on petitioner's exercise of his First Amendment rights. Contrary to petitioner's suggestion (Pet. 73-74), the fact that other persons might have filed erroneous Form W-4Es and have been investigated by the Internal Revenue Service without prosecution is not a prima facie case of impermissible selection that would warrant an evidentiary hearing. Petitioner was prosecuted because he willfully filed a false tax form, not because he protested against the tax system. Compare *Oyler* v. *Boles*, 368 U.S. 448, 456-457 (1962).

3. Finally, petitioner contends (Pet. 76-77) that the method of jury selection, taken from voter registration lists, did not represent a fair cross-section of the community and therefore violated the Sixth Amendment. But *Duren* v. *Missouri*, 439 U.S. 357 (1979), upon which petitioner relies, does not question the use of voter registration lists, but rather the underrepresentation of women. Moreover, as the court of appeals recognized (Pet. App. 13), it has been uniformly held that nonregistered voters do not constitute a distinctive group whose exclusion from the jury pool results in a denial of the Sixth Amendment guarantee of an impartial jury in criminal prosecutions. See, *e.g.*, *United States* v. *Freeman*, 514 F. 2d 171, 173 (8th Cir. 1975); *United States* v. *Lewis*, 472 F. 2d 252, 256 (3d Cir. 1973).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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